

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON

WASHINGTON DEVELOPMENT	)	
COMPANY, INC., a Montana	)	
corporation,	)	
	)	
Plaintiff,	)	Civil No. 06-676-JE
	)	
v.	)	OPINION AND ORDER
	)	
M/V PAC RIM EXPRESS, her	)	
engines, tackle and equipment,	)	
and TUG MASTER, INC., a	)	
Washington corporation,	)	
	)	
Defendants.	)	
	)	

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JELDERKS, Magistrate Judge:

Plaintiff Washington Development Company, Inc. (WDC) brings this admiralty action against defendant M/V Pac Rim Express (Pac Rim) to recover lease and custodial expenses allegedly provided as "necessaries" to that vessel. Following entry of summary judgment in favor of defendant Pac Rim on June 13, 2007, plaintiff filed the pending motion for reconsideration. For the reasons set out below, the motion is denied.

#### **FACTUAL BACKGROUND**

Plaintiff WDC, a Montana corporation, owns and operates a marine terminal at Tongue Point on the Columbia River.

Pacific Coast Barge Builders, Inc. (Barge Builders) was formed on January 31, 2005, to construct, refit, and repair barges.

Tug Master, a former defendant not named in plaintiff's operative second amended complaint, purchased defendant Pac Rim in the fall of 2004 with the intention of converting

it from an oil tank barge to a deck cargo barge. In February 2005, Tug Master and Barge Builders agreed that Barge Builders would do the conversion work on the Pac Rim in space at the Tongue Point marine terminal that Barge Builders leased from plaintiff WDC.

Beginning on February 10, 2005, plaintiff WDC leased portions of the Tongue Point marine terminal to Barge Builders. Dennis Thompson, the president of Barge Builders, was the only representative of Barge Builders involved in the lease negotiations. Jennifer Poulsen, facility manager of WDC's Tongue Point marine terminal, was the only representative of WDC involved in those negotiations. Thompson asserts that he informed Poulsen that Tug Master owned defendant Pac Rim. Poulsen disputes this assertion, and asserts that Thompson represented that Barge Builders owned the Pac Rim.

Tug Master delivered the Pac Rim to Barge Builders at the Tongue Point marine terminal, and Barge Builders began working on the barge there on February 10, 2005. The Pac Rim remained at the Tongue Point marine terminal until May 12, 2006, when the barge was arrested by the United States Marshal pursuant to process issued in this action.

Tug Master did not have any contractual relationship with plaintiff WDC, and did not enter into any lease agreement under which plaintiff agreed to provide services to the Pac Rim.

During the final months of the conversion project, Barge Builders progressively lost its ability to pay the suppliers and vendors who furnished materials and services needed in the conversion. According to the declaration of Kelly Roth, Tug Master hired Roth's company, Kelly's Welding & Fabrication LLC, "to act as owner's representative during the final months of the conversion of the barge by Pacific Coast Barge Builders." Roth states that he worked on the Pac Rim Express from August 20, 2005, until December 18, 2005. Roth adds that, "in order to ensure completion of the conversion, Tug Master began paying some of Pacific Coast Barge Builders' suppliers and vendors directly" upon his approval of their invoices to Barge Builders. He also states that he was never aware of any representation by plaintiff that it believed that it had a contractual relationship with Tug Master, or that plaintiff believed that Tug Master "was in any way responsible to pay any of Pacific Coast Barge Builders' obligations."

Roth states that, in November and December of 2005, he asked plaintiff "to segregate amounts Washington Development attributed to the barge's moorage from amounts it attributed to the lease of the terminal and to fax the moorage invoices directly to Tug Master," which then paid the moorage charges directly to plaintiff. Roth reiterates that, in conversations concerning these payments, plaintiff and its representatives never indicated that they had a contract with Tug Master, or

that Tug Master was responsible to pay for any of Barge Builder's obligations.

From October through December, 2005, Tug Master directly paid plaintiff WDC moorage fees for the Pac Rim in the amount of \$3,325 per month and rental fees in the amount of \$200 per month for a fire meter and fire monitor. According to the declaration of Fred Dahl, Jr., Tug Master's president, Tug Master made these payments, for which Barge Builders was obligated, "in order to ensure uninterrupted completion of the barge's conversion." Dahl adds that, after Tug Master made these payments, plaintiff WDC began invoicing Tug Master directly for amounts that Barge Builders owed pursuant to the lease, and refused to credit Tug Master's payments to the Pac Rim's moorage rather than to the Barge Builders' account. Dahl states that Tug Master then sought legal advice and stopped making payments to plaintiff.

Barge Builders worked on the Pac Rim as an independent contractor. Barge Builders and Tug Master had no financial interest in each other, and had no control over each other. Tug Master did not authorize Barge Builders to procure goods or services for the Pac Rim's account, and did not authorize Barge Builders to incur liens on the Pac Rim.

### PROCEDURAL HISTORY

Throughout the course of this litigation, plaintiff has presented evolving theories of its case. The original complaint, filed on May 10, 2006, named the Pac Rim; its owner, Tug Master; and the U.S. Bank as defendants. The complaint alleged that plaintiff was owed \$39,335.70 pursuant to a lease agreement between plaintiff and defendant Tug Master. The complaint also alleged that plaintiff was entitled to recover its reasonable attorney fees pursuant to a "lease agreement between plaintiff and defendants M/V PAC RIM EXPRESS and Tug Master, Inc. . . ."

Plaintiff filed a first amended complaint on May 26, 2006. That complaint was identical to the original complaint, except for the omission of U.S. Bank as a defendant.

In an Order signed on October 20, 2006, the court extended the discovery cutoff and deadline for filing dispositive motions to December 15, 2006.

On December 15, 2006, defendant Tug Master filed a motion for summary judgment asserting that plaintiff could not prevail because it had no contractual relationship with plaintiff. On January 17, 2007, while that motion was pending, plaintiff sought leave to file a second amended complaint. The proposed complaint, which named only the Pac Rim Express as a defendant, omitted any allegation that Tug Master had entered into a lease with plaintiff. The proposed complaint instead alleged that Barge Builders had represented

that it owned the Pac Rim, and "entered into a lease with plaintiff for the purpose of repairing and renovating the barge." The proposed complaint alleged that moorage and other space plaintiff provided to the barge "constitute necessities within the meaning of the Maritime Lien Act, 46 U.S.C. § 31342."

Defendant Tug Master opposed the motion for leave to file a second amended complaint on the grounds that plaintiff had failed to show good cause for amendment after the motion for summary judgment had been filed, that amendment was unfairly prejudicial, that amendment constituted an untimely involuntary dismissal of defendant Tug Master, and that amendment was futile because the claim asserted in the proposed second amended complaint could not withstand summary judgment. This latter argument was premised on defendant's assertion that the "necessaries" in question were provided pursuant to the representations of Barge Builders, which was not a "person authorized by the owner" to obtain necessities for a vessel under 42 U.S.C. § 31342.

In an Opinion and Order filed on March 21, 2007, I granted plaintiff's motion for leave to file a second amended complaint, and denied defendant's motion for summary judgment. In the Opinion, I noted that, but for the filing of a second amended complaint, defendant would have been entitled to summary judgment because there was no evidence that defendant Tug Master entered into the lease agreement alleged in the

operative first amended complaint. I concluded that "good cause" for amendment existed, in part, because the amount in controversy was very modest, and it appeared that plaintiff had attempted to minimize litigation expenses. In denying the motion for summary judgment, I noted that, though there was no evidence that defendant Tug Master engaged Barge Builders as anything other than an independent contractor or intended that plaintiff supply terminal facilities, the issue of Barge Builders' authority had not been explored because it was not relevant until plaintiff filed its second amended complaint.

As noted above, the second amended complaint named only the Pac Rim Express as a defendant, and alleged that Barge Builders "represented itself as the owner of the BARGE PAC RIM EXPRESS and entered into a lease with plaintiff for the purpose of repairing and renovating the barge." The second amended complaint further alleged that plaintiff provided space "for the purpose of supporting the repair and renovation of the vessel," pursuant to Barge Builders' representation that it owned the Pac Rim, and pursuant to the written lease. This complaint alleged that the moorage and other space plaintiff provided for the Pac Rim "constitute necessities within the meaning of the Maritime Lien Act, 46 U.S.C. § 31342." It added that the reasonable value of "the necessities" it provided is \$34,665. Plaintiff also alleged

that it is entitled to recover \$100 per day in "custodian fees" for a total of 41 days that the Pac Rim was in its custody after it was arrested by the U.S. Marshal.

In an Opinion and Order filed on June 13, 2007, I granted defendant Pac Rim Express' motion for summary judgment.

#### **DISCUSSION**

Plaintiff's second amended complaint alleged that Barge Builders represented itself as the owner of the Pac Rim Express, and that plaintiff provided the barge "necessaries" based upon that representation and upon the written lease agreement. In its opposition to defendant's motion for summary judgment, plaintiff argued that the Pac Rim was liable for the costs of the moorage and other space it had provided because Barge Builders had represented that it owned the Pac Rim.

I granted defendant Tug Master's motion for summary judgment because the record before the court would not support the conclusion that Barge Builders qualified as a "person" with authority to procure necessities for the Pac Rim. In the Opinion granting the motion for summary judgment, I noted that there was no evidence that Tug Master appointed Barge Builders to act as its "agent" within the meaning of § 31341, and concluded that, under relevant decisions from this Circuit, plaintiff could not establish that Barge Builders had the authority required to procure necessities for which the Pac

Rim could become liable through the imposition of a maritime lien. I concluded that, though there was a factual disagreement as to what representations Barge Builders had made about the ownership of the Pac Rim, this dispute was not material because there is no evidence that the Pac Rim's owner made, participated in, confirmed, or knew or should have known of any misrepresentation to plaintiff about the ownership of the vessel.

In its motion for reconsideration, plaintiff presents a legal argument that was not expressed or implied in either its second amended complaint or in its opposition to either of the motions for summary judgment. Plaintiff now argues, for the first time, that Roth's presence as Tug Master's agent at the Tongue Point work site and Roth's request that plaintiff send moorage invoices to Tug Master raises an issue of fact as to whether a maritime lien arose through direct dealings between plaintiff and Tug Master. It also argues, for the first time, that there was "no dispute that after Pacific Coast Barge Builders dropped out of the picture, plaintiff was a 'person providing necessities' on the order of the owner or an authorized agent." It adds that, because Roth represented Tug Master after Barge Builders' demise, summary judgment was inappropriate "from at least November 2005 on."

In its motion for reconsideration, plaintiff now seeks to avoid summary judgment by asserting a basis of liability not alleged in the operative complaint or argued when defendant's

first or second motions for summary judgment were pending. Nothing in plaintiff's complaint or in its response to defendant's summary judgment arguments would have informed defendant or the court that plaintiff asserted an entitlement to lease payments based upon any direct dealings between Tug Master and plaintiff or upon communications through Roth. Instead, as plaintiff's legal theories have evolved, plaintiff first alleged that Tug Master had a direct contractual relationship with plaintiff that was formalized by a written lease. When Tug Master's first motion for summary motion demonstrated the absence of evidence supporting that allegation, plaintiff moved to amend its complaint to allege that the Pac Rim is liable based upon representations made by Barge Builders and a contract between Barge Builders and plaintiff.

Defendant has already filed two motions for summary judgment, both of which were well-founded based upon the pleadings in question at the time. Plaintiff has ultimately responded to both motions by asserting a legal theory not at issue when the motion was filed. It did not assert its most recent theory of liability until defendant's motion for summary judgment had been granted. Plaintiff has had ample opportunities to refine its legal theories before this point, and it is not fair to require defendant to bear the expense of continuing to respond to what are essentially new theories of liability.

Plaintiff now contends that, in reviewing the motion for summary judgment, this court was required to "consider the entire record before it" and "could not limit its review to the pleadings." Reply in Support of Plaintiff's Motion for Reconsideration at 2-3. These assertions demonstrate a misunderstanding of a plaintiff's responsibility to plead the basis upon which it seeks recovery and of the court's responsibility in reviewing a motion for summary judgment. The court's examination of whether material issues of fact exist is framed by the pleadings. In considering whether a defendant is entitled to summary judgment, the court determines whether a material issue of fact exists as to a basis of liability that the plaintiff has actually asserted.

The operative complaint against which defendant most recently sought summary judgment alleged that defendant was liable for necessities because Barge Builders had represented itself as the Pac Rim's owner and because Barge Builders had entered into a lease with plaintiff. The complaint further alleged that plaintiff provided moorage and other space to the Pac Rim "pursuant to Barge Builders' representation that it owned the Pac Rim, and pursuant to" a written lease that was between Barge Builders and plaintiff. Certainly, the court was required to determine whether the record as a whole could lead the trier of fact to find in plaintiff's favor. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). However, that obligation extended to bases

of liability plaintiff had actually pleaded. Plaintiff has not cited any authority for the proposition that, in evaluating a motion for summary judgment, it is the court's role to determine whether a party might be entitled to relief on some ground that it has not pleaded.

In evaluating defendant's most recent motion for summary judgment, the court carefully reviewed plaintiff's complaint, the evidence submitted by the parties, the parties' arguments concerning the legal significance of that evidence, and the relevant statutes and decisions. A thorough examination of the evidence before the court did not disclose the existence of any evidence that would support plaintiff's allegation that the Pac Rim was liable to plaintiff based upon Barge Builders' alleged representation that it owned the Pac Rim, or pursuant to the written lease between Barge Builders and plaintiff. It was not the court's duty to determine whether the evidence might support some theory of recovery which plaintiff had not asserted.

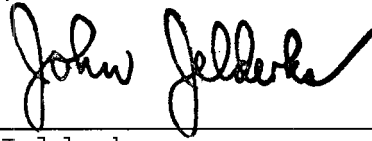
In reviewing the pending motion for reconsideration, I have again reviewed the relevant second amended complaint, which sets out the only basis upon which relief could be granted which is before the court. I have reviewed my earlier decision granting defendant's motion for summary judgment, the arguments concerning that motion that the parties filed earlier concerning that motion, and the relevant statutes and decisions. Based upon that review, I remain convinced that

plaintiff has not shown the existence of evidence from which it could prevail on the allegations set out in its second amended complaint. Accordingly, the motion for reconsideration is denied.

**CONCLUSION**

Plaintiff's motion for reconsideration (#69) is DENIED.

DATED this 20<sup>th</sup> day of November, 2007.

A handwritten signature in black ink, appearing to read "John Jelderks", is written over a horizontal line.

John Jelderks  
U.S. Magistrate Judge